INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional and statutory provisions involved	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:	
Banzhaf v. *Federal Communications Commission*, C.A.D.C. No. 21285, decided November 21, 1968, pending on petitions for certiorari, Nos. 1036, 1059, 1060, 1067, O.T., 1968	10
Simmons v. *Federal Communications Commission*, 169 F. 2d 670, certiorari denied, 335 U.S. 846	9
Trinity Methodist Church v. *Federal Radio Commission*, 62 F. 2d 850, certiorari denied, 288 U.S. 599	9
Constitution and statutes:	
United States Constitution, First Amendment	7, 10
Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151–609)	2
Sec. 326	7

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 990

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH PACIFIC SOUTHWEST REGIONAL OFFICE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND TRANS AMERICA BROADCASTING CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the the court of appeals (Pet. 2a–12a) is reported at 403 F. 2d 169. The Commission's memorandum opinion (Pet. 13a–66a) is reported at 4 F.C.C. 2d 190; its memorandum opinion and order denying reconsideration (Pet. 69a–95a) is reported at 6 F.C.C. 2d 385.

JURISDICTION

The judgment of the court of appeals (Pet. 1a) was entered on September 30, 1968. The petition for a writ

335-854—69

of certiorari was filed on January 29, 1969, the time having been extended by order of Mr. Justice Black on December 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission was precluded from renewing a radio station's broadcast license without a hearing because, during the preceding three-year license term, the station had carried several syndicated anti-Semitic broadcasts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151–609) are set forth in the Appendix to the Petition (Pet. 95a–96a).

STATEMENT

In the fall of 1965, Trans America Broadcasting Corporation filed with the Federal Communications Commission an application for renewal of its license for radio broadcast station KTYM, Inglewood, California.[1] Pursuant to established Commission procedures, the Pacific Southwest Regional Office of the Anti-Defamation League of B'nai B'rith (hereafter ADL) opposed the application on grounds arising out of the fact that on several occasions during the three-year license term then ending KTYM had

[1] Inglewood is a part of the Los Angeles metropolitan area. Trans America Broadcasting Corporation, owned solely by Albert J. Williams, had been licensee of KTYM since 1958.

carried syndicated broadcasts containing anti-Semitic material.

KTYM's renewal application set forth a detailed description of the station's programming and program policies (R. 5–6, 11–32). In addition to a heavy proportion of recorded music, about 25% of KTYM's past and projected schedule was devoted to religious broadcasts representing the major denominations and another 20–30% to news, talk and discussion. One of the talk programs was a five-day-a-week 15 minute program called "Conservative Viewpoint" taped and distributed to radio stations across the country by one Richard Cotten (R. 23), who has no other connection with KTYM.

The gist of the ADL opposition (R. 39–45) was that in carrying several of the Cotten broadcasts in 1964 and 1965 the licensee knowingly disseminated anti-Semitic views and that such programs are contrary to the public interest.[2] ADL further complained that defamatory and untrue attacks on ADL and some of its officers and staff by Cotten had been broadcast, and that KTYM had failed to comply with the requirement of the Commission's Fairness Doctrine that the subjects of such attacks be promptly notified and offered response time.[3] It conceded, however, that,

[2] The text of several Cotten programs was attached to the complaint (R. 45–53, Pet. 42a-62a).

[3] In general, the Fairness Doctrine requires licensees to afford reasonable opportunities for the presentation of conflicting views on issues of public importance. One aspect of the Doctrine (codified in the Commission's rules since the events here in question) provides special licensee obligations regarding noti-

after it complained to the station, the licensee had offered an opportunity to reply which ADL declined.

In response (R. 54–83), KTYM denied that Cotten's program was *per se* unsuitable and stated that listener response had been overwhelmingly favorable. KTYM's position was that it would continue to carry the views of seemingly responsible commentators like Cotten, that to verify each of their statements would be virtually impossible, and that it would comply with the Fairness Doctrine when necessary by providing opportunities for presentation of opposing viewpoints.

On June 17, 1966, the Commission, Commissioner Cox dissenting, released its decision granting KTYM's renewal application (Pet. 13a–66a) and its related letter to KTYM (Pet. 67a–68a). The Commission's action was based upon "an overall review of KTYM's operation," including ADL's charges (Pet. 67a), as to which it considered that the facts were fully presented by the documents before it (Pet. 13a). The Commission found that with respect to one Cotten broadcast attacking ADL and its general counsel the station had violated the personal attack policy of the Fairness Doctrine by failing to give them the required notice, and it reprimanded the station for this violation (Pet. 68a). But it found that KTYM had otherwise

---

fication and opportunity for response in the case of attacks upon individuals or groups in discussions of controversial public issues. The nature and history of the Doctrine are fully discussed in the Brief for the United States and the Federal Communications Commission in *Red Lion Broadcasting Co.* v. *United States* and *United States* v. *Radio Television News Directors Association*, Nos. 2 and 717, this Term.

complied with the Fairness Doctrine by offering reply time and noted its undertaking to continue to do so, and accordingly concluded that the single isolated violation should not prevent renewal (Pet. 16a, 68a).

On the broader question raised by ADL, whether Cotten's anti-Semitic broadcasts were so contrary to the public interest that a licensee who permits them should be disqualified, the Commission stated the issue to be whether the agency should "act to suppress the expression of views which it abhors or * * * require the opportunity for the expression of opposing views" (Pet. 14a). In the Commission's judgment, the latter was clearly the better course:

> The Commission has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views. [Pet. 15a.]

ADL then filed a petition for reconsideration (R. 395–420), in which it urged particularly that the licensee should have investigated and verified the truth

of the matter broadcast. The Commission reaffirmed its earlier action in a further elaborated opinion from which Commissioner Cox again dissented; Commissioner Loevinger concurred separately (Pet. 69a–95a). The Commission's opinion pointed out that:

> Faced with possible harassment which includes loss of license at renewal, licensees, under the verification approach urged by ADL, might well tend to avoid presentation of controversial issue programming. This would be especially true of the smaller broadcast outlet, where the cost and time consumed in the verification process would constitute a considerable deterrent. Thus, were we to follow this course, we would be significantly inhibiting debate on controversial issues and at the least rendering such debate "less robust and less wide-open." But our holdings, from the *Editorializing Report,* 13 F.C.C. 1246, 1947–48 (1948) to the recent *Pacifica* decision (36 F.C.C. 147, 149 (1963)), have sought to promote the opposite—the fullest possible robust debate on public issues. There has been no showing of consequences adverse to the public interest which would lead us to act against that fundamental and all-important policy objective. * * * [Pet. 71a–72a.]

And the Commission reiterated that:

> * * * whether [the] issue is couched in terms of prohibiting specific broadcasts or of licensee responsibility, the crucial element is, in the final analysis, the effect on free speech—on the widest possible dissemination of ideas and concepts, however controversial or perhaps understandably offensive to some. Our decision in this case, while it necessarily takes into account the facts of the case, is based on policy considerations applicable overall to the broadcast field, and is designed to promote the public interest *generally.* * * * [Pet. 69a–70a.]

ADL appealed and the court below unanimously affirmed the Commission's action (Pet. 2a–12a). Both the majority opinion and the concurring opinion of Judge Wright (Pet. 8a, 11a–12a) expressed the view that the Commission has the authority under the Communications Act to deny an application for renewal of license where a pervasive pattern of irresponsible programming is shown, but observed that the First Amendment and Section 326 of the Act require the Commission to "proceed cautiously" in this area. The court held that no hearing was required with respect to the renewal since the issues raised by ADL "turned not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be derived from those facts" (Pet. 5a), and further concluded that there was a substantial basis in the record for the Commission's action.

ARGUMENT

Petitioner would have this Court determine whether the First Amendment precludes the Commission from determining at renewal time whether a licensee has adequately performed his duty to serve the public interest (Pet. 3). But that question is not presented on this record, nor is there any dispute as to its answer.

The Commission's action did not depend upon any perceived First Amendment constraints. To be sure, it did observe that adoption of ADL's position would raise "serious constitutional questions" (Pet. 72a), but its decision was squarely based on "the basic policy determination * * * to maximize the opportu-

nity for free discussion of ideas and concepts on broadcast media." (*Ibid.*) Moreover, the Commission has not shown any doubt as to its power and duty to test licensee performance against the needs of the public interest. As its opinions clearly show, the Commission did so test this licensee's performance, and found it—all things considered—not inconsistent with the public interest. The court of appeals properly held that the record supported the Commission's exercise of its statutory judgment, and that there was no need for the fully developed facts before the Commission to be explored further at a hearing.

The Commission's decision is based upon the policy judgment that in the administration of the Communications Act the wisest course and the one which best serves the public interest is that which encourages, rather than inhibits, the carriage of controversial and unorthodox views. The agency quite properly concluded that a grant of the ADL complaint would have an inhibiting effect on licensees, causing them to avoid airing unorthodox views or views which might offend some members of the listening public lest their licenses be placed in jeopardy. To require a broadcaster, as a condition of his license, to delete all possibly defamatory matter and to verify the truth of all material he broadcasts would impose an unacceptable burden. Broadcasters—and especially smaller stations—must be given a reasonable amount of latitude in accepting program material from networks,

wire services and syndicated sources.[4] To be sure, consistent presentation of false material knowingly or with reckless disregard for the truth would raise serious question as to a licensee's qualifications. But that is not the situation here. The Commission found that KTYM had accepted responsibility for its broadcasts and—with the exception of the single personal attack problem—its obligation under the Fairness Doctrine to afford opportunities for the presentation of opposing views.[5]

---

[4] Of course Commission action renewing a broadcast license in no way immunizes the licensee from liability under applicable state libel or defamation statutes.

[5] The evidence before the Commission showed that, after receiving a complaint from ADL, the licensee sought to arrange a meeting between himself, Cotten, and ADL to explore the differences and perhaps air them free of charge in a round-table discussion (R. 94, 157–158, 250–251); that after that meeting, the licensee wrote on occasions to Cotten requesting documentation with respect to certain matters raised by ADL (R. 103); and that the licensee regarded the controversy as so complex that "ventilation of both sides" was the best course (R. 248). KTYM auditions all the Cotten tapes, as well as others, removing whatever is adjudged unduly harsh or unwarranted (R. 425), and where appropriate notifying individuals who might wish to use the station's facilities to respond (R. 565).

ADL's complaint here was based on a few samples of a single fifteen minute program out of more than 100 hours of broadcasting weekly. Thus there is no inconsistency between this case and earlier decisions upholding Commission actions failing to renew licenses for programming deficiencies. See *Simmons* v. *Federal Communications Commission*, 169 F. 2d 670, (C.A.D.C.), *certiorari denied*, 335 U.S. 846; *Trinity Methodist Church* v. *Federal Radio Commission*, 62 F. 2d 850 (C.A.D.C.), *certiorari denied*, 288 U.S. 599. Those cases, unlike this case, involved fundamentally objectionable programming which permeated and gave the dominant theme to the station's schedule.

Granting that knowing false statements and false statements made with reckless disregard of the truth are, as ADL argues (Pet. 18), constitutionally unprotected, surely it does not follow that the First Amendment *requires* the Commission to suppress unprotected speech by persons using licensees' facilities. The Commission has concluded that the public is better served by the Fairness Doctrine than it would be by imposing rigorous licensee self-consorship, and there is no warrant for this Court to question that judgment. Certainly this Court is not called upon to advise as to how far the Commission might go in imposing self-censorship if it were to change its policy.

This case bears no significant relationship to the pending cases relating to the constitutional validity of the Commission's personal attack policy and rules,[6] or to the petitions for writs of certiorari that have recently been filed attacking the application of the Fairness Doctrine to cigarette advertising.[7] Those cases concern the Commission's efforts to ensure that contrasting views will be heard, whereas petitioner here

---

[6] *Red Lion Broadcasting Co.* v. *United States*, No. 2, this Term, certiorari granted, 389 U.S. 968; *United States* v. *Radio Television News Directors Association*, No. 717, this Term, certiorari granted, January 13, 1969.

[7] *Banzhaf* v. *Federal Communications Commission*, C.A.D.C. No. 21,285, decided November 21, 1968, pending on petitions for certiorari *sub nom. The Tobacco Institute* v. *Federal Communications Commission*, No. 1036, this Term; *National Association of Broadcasters* v. *Federal Communications Commission*, No. 1059, this Term; *American Broadcasting Companies, Inc.* v. *Federal Communications Commission*, No. 1060, this Term; and *National Broadcasting Company, Inc.* v. *Federal Communications Commission*, No. 1067, this Term.

urges that, without regard to any right of reply, certain kinds of programming should be suppressed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. MCLAREN,
Assistant Attorney General,
GREGORY B. HOVENDON,
Attorney.

HENRY GELLER,
General Counsel,
JOHN H. CONLIN,
Associate General Counsel,
STUART F. FELDSTEIN,
Attorney,
Federal Communications Commission.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969